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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No.

ALAN E. KLIGERMAN, GEORGE A. KLEINHANS, ROBERT E. JEFFRIES and CLIFFORD J. HOGAN,
Petitioners,

vs.

JOHN A. LYNCH, President of the Senate of the State of New Jersey, etc., et als.,
Respondents.

BRIEF IN OPPOSITION TO GRANTING OF A PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW JERSEY.

Your Respondents pray that a writ of certiorari to review the order of the Supreme Court of New Jersey, entered in the above entitled case on February 28, 1967, be denied.

QUESTION PRESENTED.

In this Brief, in opposition to the granting of a writ of certiorari to the Supreme Court of New Jersey only one question will be argued, that being whether the questions originally presented to the courts of the State of New Jersey have become moot or abstract and thus non-justiciable.

CONSTITUTIONAL PROVISIONS INVOLVED.

Article III, Section 2 of the Constitution of the United States provides as follows:

> "The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority;—to all cases affecting ambassadors, other public ministers, and consuls;—to all cases of admiralty and maritime jurisdiction;—to controversies to which the United States shall be a party; to controversies between two or more States;—between a State and citizens of another State;—between citizens of different States;—between citizens of the same State claiming lands under grants of different States, and between a State, or the citizens thereof, and foreign states, citizens or subjects."

COUNTER-STATEMENT OF THE CASE.

The Respondents can join generally in the Statement of the Case contained in the Petition heretofore presented. Respondents do wish to stress, however, that this matter was dismissed at the trial level upon motion made prior to the filing of an Answer. For that reason, and for that reason only, the allegations of the Complaint are to be taken as true. Respondents also point out that at no time was the person most intimately involved in this matter, namely David M. Perskie, ever a party to this suit.

REASONS FOR DENYING THE WRIT.

It would seem axiomatic that in every case wherein it is held that a matter has become moot and as a consequence non-justiciable, questions are left undetermined. That is the situation here. The case has become undeniably moot but it is claimed by the Petitioners that the mere presence of an interesting question unadorned by any actual matters

in controversy is sufficient justification for invocation of this Court's jurisdiction.

Had Petitioners merely submitted a hypothetical question to this Court, there could be no doubt as to the final determination. The Constitution precludes the rendition of advisory opinions. *United States Constitution, Article III, Section 2; Muskrat* vs. *United States,* 219 U. S. 346 (1911). It is Respondents' contention that at this point what Petitioners are seeking amounts to an advisory opinion.

The only case cited by Petitioners to justify their claim that the matter is not moot is *United States of America* vs. *W. T. Grant and Company, et al.* 345 U. S. 629 (1953). That case involved conduct purportedly illegal in that it was contrary to the dictates of the Clayton Act. The Court rightly pointed out that "voluntary cessation of allegedly illegal conduct does not deprive the tribunal of power to hear and decide the case, i.e. does not make the case moot." It would seem clear that mere cessation of illegal activity aimed only at defeating jurisdiction of a court should not, and it was so held in the *Grant* case, render a matter moot.

It is Respondents' contention, however, that the *Grant* case is not dispositive of the situation here involved. Indeed, there is no contention on the part of Petitioners that there has been a cessation of activity for the mere purpose of avoiding adjudication.

Instead, what has occurred here is what occurs normally in cases which are declared moot. Time passes and in the natural course of events the situation giving rise to the litigation disappears.

That is what happened in *Local No. 8-6, Oil, Chemical and Atomic Workers International Union, AFL-CIO, et al.* vs. *Missouri,* 361 U. S. 363 (1960). In that case, an attack was made upon injunctive action taken by the Governor of Missouri pursuant to statutory authority granted to him by the State Legislature. By the time the case had reached the Supreme Court the injunction had expired. The Court refused to rule upon the merits of the case because the matter had become moot. There was before the court no

"actual matters in controversy essential to the decision of the particular case before it." Citing *United States* vs. *Alaska S. S. Co.*, 253 U. S. 113, 116 (1920).

So too, in our present case, there are no actual matters in controversy before the Court. Petitioners entire claim is based upon the failure of the New Jersey State Senate, on June 6, 1966, to advise and consent to the nomination of the Honorable David M. Perskie to be Judge of the Atlantic County Court. The Senate on November 28, 1966, did fill the court vacancy by confirming the same Honorable David M. Perskie and it is contended that this latter occurrence rendered the matter moot. There is absolutely no claim by Petitioners that there is anything but mere abstract questions left to be decided. Nothing that this Court could do would affect in any way the judicial situation in Atlantic County.

It was because this case became moot that both the Appellate Division of the New Jersey Superior Court and the Supreme Court of New Jersey refused to hear the matter They refused to treat with abstractions when dealing with Constitutional questions. This Court should not now presume that if a proper case reached the Supreme Court of New Jersey it might make a determination contrary to sound constitutional law. This Court is urged to allow the Supreme Court of New Jersey, in a proper case, to rule upon questions involving its own affairs prior to United States Supreme Court review. *Allen Bradley Local* vs. *Wisconsin Board,* 315 U. S. 740 (1942).

Respondents do not, by filing this brief, concede that there are no other reasons why Respondents should not ultimately prevail in this matter and Respondents respectfully reserve the right to raise further arguments in the event this Petition is granted.

CONCLUSION.

For the reasons stated, it is respectfully submitted that the requested Petition for Certiorari be denied.

Respectfully submitted,

THOMAS F. CONNERY, JR.,
Attorney for Respondents.